

## 48A C.J.S. Judges § 327

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### IX. Disqualification to Act

#### D. Objections to Judge and Proceedings Thereon

##### 3. Determination of Objection to Judge

## § 327. Disqualification dependent on legal sufficiency of affidavit—Scope of inquiry

[Topic Summary](#) | [References](#) | [Correlation Table](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#)  51(4)

**Under some statutes, notwithstanding that the judge may not pass on the truth or falsity of allegations of fact in the affidavit, the judge must determine the legal sufficiency of the affidavit and may pass on the sufficiency of the facts, grounds, and reasons stated in the affidavit.**

Under some statutes providing a procedure for disqualification by an affidavit of bias or prejudice which is to be regarded as conclusive of the truth or falsity of allegations of facts on which disqualification is claimed, the court may still determine the legal sufficiency of the application or affidavit<sup>1</sup> and may pass on the sufficiency of the facts, grounds, and reasons stated in the affidavit.<sup>2</sup> Such determination may be made in the context of other affidavits as well as on the record and the other pleadings on file in the action,<sup>3</sup> for a judge is presumed to be impartial, and there is a substantial burden upon the moving party to sufficiently demonstrate otherwise.<sup>4</sup> The decision whether a judge's impartiality can reasonably be questioned, for purpose of a recusal motion, is to be made in light of the facts as they exist and not as they are surmised or reported.<sup>5</sup>

The judge must determine whether the facts alleged establish "fair support" for the charge of bias.<sup>6</sup> An inquiry into actual bias is just one step that judge must take in deciding whether recusal is required; objective standards may also require recusal whether or not actual bias exists or can be proven.<sup>7</sup> The standard by which the facts and reasons stated in an affidavit of bias and prejudice must be judged in order to determine whether the judge's impartiality might reasonably be questioned is the objective reasonable person test.<sup>8</sup> The court must also determine whether or not the affidavit has been executed properly and in conformity with the statute,<sup>9</sup> and whether it has been filed in time,<sup>10</sup> and whether notice of the intended filing thereof is sufficient.<sup>11</sup>

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Footnotes

- 1 U.S.—U.S. v. Serrano, 607 F.2d 1145 (5th Cir. 1979).  
  
Colo.—Carr v. Barnes, 196 Colo. 70, 580 P.2d 803 (1978).  
  
Fla.—Brewton v. Kelly, 166 So. 2d 834 (Fla. 2d DCA 1964).
- 2 Ky.—Miller v. Miller, 459 S.W.2d 81 (Ky. 1970).  
  
La.—State v. Bennett, 341 So. 2d 847 (La. 1976).
- 3 U.S.—In re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961); Fong v. American Airlines, Inc., 431 F. Supp. 1334 (N.D. Cal. 1977).
- 4 § 330.
- 5 U.S.—Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004).
- 6 U.S.—Smith v. Danyo, 585 F.2d 83, 26 Fed. R. Serv. 2d 620 (3d Cir. 1978); Deal v. Warner, 369 F. Supp. 174 (W.D. Mo. 1973).  
  
**Reexamination of merits of rulings inappropriate**  
U.S.—U.S. v. International Business Machines Corp., 475 F. Supp. 1372 (S.D. N.Y. 1979), *aff'd*, 618 F.2d 923 (2d Cir. 1980).
- 7 U.S.—Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).
- 8 U.S.—Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976); Kennedy v. Bell South Telecommunications, Inc. (AT & T), 2013 WL 5663196 (11th Cir. 2013).  
  
Ill.—In re Marriage of O'Brien, 393 Ill. App. 3d 364, 332 Ill. Dec. 242, 912 N.E.2d 729 (2d Dist. 2009), judgment *aff'd*, 2011 IL 109039, 354 Ill. Dec. 715, 958 N.E.2d 647 (Ill. 2011).  
  
**Reasonable factual basis**  
The trial judge must hear cases unless some reasonable factual basis to doubt the impartiality or fairness of the tribunal is shown by some kind of probative evidence, and it is not necessary that the impartiality of every federal judge be demonstrated beyond a reasonable doubt in the usual sense of that phrase.  
  
U.S.—Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979).
- 9 U.S.—U.S. v. Civella, 416 F. Supp. 676 (W.D. Mo. 1975).  
  
Ariz.—Liston v. Butler, 4 Ariz. App. 460, 421 P.2d 542 (1966).  
  
Ill.—People v. Thomas, 58 Ill. App. 3d 460, 16 Ill. Dec. 20, 374 N.E.2d 795 (1st Dist. 1978).
- 10 Alaska—McCracken v. State, 521 P.2d 499 (Alaska 1974).  
  
Mich.—People v. Dixon, 403 Mich. 106, 267 N.W.2d 423 (1978).  
  
Ohio—Household Consumer Discount Co. v. Pokorny, 60 Ohio App. 2d 253, 14 Ohio Op. 3d 232, 396 N.E.2d 803 (8th Dist. Cuyahoga County 1978).  
  
**Filing at earliest practical moment sufficient**

Ill.—*People v. Harston*, 23 Ill. App. 3d 279, 319 N.E.2d 69 (2d Dist. 1974).

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Mo.—*In re Boeving's Estate*, 388 S.W.2d 40 (Mo. Ct. App. 1965).

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